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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 983

KENNETH HERBERT HANNA,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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OPINION BELOW

The opinion of the Court of Appeals is reported in 393 F.2d 700, and is included herein as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered March 5, 1968. Appendix A. An order granting a rehearing was entered on April 17, 1968. Appendix B. The judgment on rehearing was entered on November 18, 1968. Appendix C. A petition for rehearing was denied December 30, 1968. Appendix D. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Can the telephone company monitorings of illegal communications become legal evidence.

STATUTE INVOLVED

47 U.S.C. 605 provides in pertinent part:

> "* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* * *"

Amendment Four to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The case may be summarized in one sentence. In an attempt to find non-paying users of long distance lines, the telephone company tapped the telephone conversations of Kenneth Herbert Hanna and produced there-

from the evidence that resulted in his conviction for interstate gambling. However, because the opinion of which this petition complains referred to an "error of fact" it becomes necessary to consider all facts in more detail.

In the first opinion of the fifth circuit the court stated "there was no dispute about the facts" and proceeded to quote the government version, which is as follows:

> "In the twenty-seven day period from November 24, 1965, to December 21, 1965 over 500 telephone calls were placed from defendant Hanna's phone to a distant information operator (e.g. 1-area code-555-1212) (R. 35). This was discovered during an investigation of Hanna's phone conducted solely by the American Telegraph and Telephone (sic) Company and its subsidiary, Southern Bell Telegraph and Telephone (sic) Company. Hanna's phone had become the focus of an investigation by the telephone company, after an official of the company in New York detected an unusual condition on Miami phone number 945-9723. He notified Gerard Doyle, Security Manager of Southern Bell Telegraph and Telephone (sic) Company, of this unusual condition and that the condition indicated that in all likelihood a device known as a 'blue box'[1] was being used on the line. (R. 34, 295). Doyle investigates toll frauds for the telephone company. Doyle knew from experience

that bookmakers use these devices. (R. 40-42, 295). So when he discovered that 945-9723 was subscribed to by Kenneth Hanna, whom Doyle knew to be a local bookmaker (R. 40, 295), he instructed company engineer, Ray Fowler, to determine if the unusual condition was a 'blue box'. On November 24, 1965 Fowler attached a piece of electronic equipment to Hanna's line capable of sensing a 2600 cycle tone originating at the subscriber's telephone. (R.42).[2] It was attached to Hanna's line before the line reached the toll network. (R. 66). Each time the detection unit sensed a 2600 cycle tone it activated a 'peg counter meter' which is simply a counting device for totalling the number of times a 2600 cycle tone is perceived by the detection unit. (R. 42, 80, 41).

"That night Fowler called Doyle and indicated that the counter was registering. (R. 43). Doyle then advised him to put a tape recorder on Hanna's line to record the sounds made by the 'blue box'. (R. 43, 80, 82). The tape recorder was unattended and was set to cut off automatically 35-45 seconds after being activated by the 2600 cycle tone on the subscriber's line. (R. 43, 44).[3] Fowler was certain that a 'blue box' was being used and notified Doyle. (R. 45, 46, 83, 84). The detection unit, counter and unattended recorder remained on Hanna's line sporadically for twenty-three of the next twenty-six days until on

December 21, 1965, Doyle received a subpoena directing him to produce all the recordings before a Federal Grand Jury in Philadelphia, Pa. (R. 46-49, 296) He appeared the following day and turned the tapes over to the Grand Jury. (R. 57). This is the first time anyone in the Federal Government had knowledge that Hanna's line was being monitored. (R. 50).[2] Attorneys for the United States Department of Justice handling the Philadelphia Grand Jury turned the tapes over to the Federal Bureau of Investigation. The tapes were in turn given to Special Agent William Heist in Miami who contacted Doyle on December 30, 1965. (R. 61). This is the first time Doyle was ever contacted by an agent of the Federal Government relating to this matter (R. 50, 51, 61, 94) and he never did tell anyone outside the Grand Jury what was on the tapes. (R. 57)."[3]

"Based on the conversations contained in the tapes, Heist and Special Agent Maurice Roussell obtained a search warrant for Hanna's home and an arrest warrant for his person. (R. 91). Heist also determined that defendant Modell was one of the people called by Hanna in New York City. (R. 87, 92, 160). Because the conversations between Hanna and Modell revealed they were engaged in the use of interstate facilities in aid of bookmaking, as they later admitted by stipulation, arrest and search warrants were also issued against defendant

Modell and his apartment. On January 8, 1966, agents of the Federal Bureau of Investigation executed the warrants and bookmaking paraphernalia was seized at both places. The 'blue box' was seized at Hanna's residence. (R. 100)."

SOME VARIATIONS ON THE STATEMENT OF THE CASE

The court in footnotes 1, 2 and 3 expressed some reservations more specifically (1) They expressed some doubt that "only" by placing a tape monitor on the Hanna line could the company determine the illegal use. (2) They expressed some doubt that the first time anyone in the government had knowledge of the wiretap was when the company official testified before the Grand Jury. The court's doubt that a wiretap was the only solution to the telephone company's problem of catching thieves on their lines was adequately answered in the reversed first opinion wherein in a footnote they said:

> As previously indicated, we do not accept at face value all that the Government says in footnote 3 to its brief. It seems to us that the use of the blue box detection unit with the peg counter meter, *but without the tape recorder,* would have given the telephone company adequate protection. With information thus lawfully obtained, a routine inspection might have resulted in the discovery and removal of the blue box. The telephone company might

> also have reported to appropriate governmental authority the probable commission of a crime, following which the Government might have obtained a search warrant for the electronic search, as now authorized by the recent *Katz* decision referred to in footnote 14, or even for the blue box itself. A search warrant is of course not available to the telephone company. See 47 Am.Jur., Searches and Seizures, § 4, p. 504, § 56, pp. 536, 537; 79 C.J.S., Searches and Seizures, § 63, p. 825.

The second reservation made by the court in the first opinion was to the fact that while at the very instant a telephone company official was eavesdropping on Hanna's line he received a subpoena to appear before a Grand Jury in a distant city—all without some connection between the telephone company and the government before the issuance of the subpoena.

Petitions cannot help but interpolate that the incredulity of the court in the first instance was not the doubt of St. Thomas but was in fact the logic of St. Thomas Aquinas. Or, to put it very bluntly petitioner still believes that only collusion between the telephone company and the government could have produced the right subpoena for the right material at the right time.

However the original opinion was reversed in the later opinion because of: Error of Law - the Fifth Circuit did not follow United States vs. Sugden, 226 F.2d 281 (9th Cir. 1955), affirmed per curiam, 351 U.S. 916, 76 S.Ct. 709. Error of fact the mistaken inference "—

that prior to the issuance of the subpoena duces tecum, the existence and some inkling of the contents of the communications were disclosed to the Government by some telephone company employee".

The Triple Threat of Mr. H. W. William Caming

The court reversed its original opinion on an error of fact or erroneous inference that there must have been ". . . some inkling" of information moving from the telephone company to the government before the issuance of this subpoena. This reversal did not result from a re-evaluation of material within the record, but obviously from the handiwork of one Mr. H. W. William Caming of the legal staff of the Southern Bell Telephone & Telegraph Company. This versatile individual does not appear in this record until the final rehearing, but once he does appear, he does so in a three ply capacity.

As amicus curiae, he informed the court that they had already made grave error by denying the company the right to listen to any and all telephone conversations to see if someone was sneaking a free call. This friend would have the court believe that no constitutional rights are at issue if the company without a semblance of legal process proceeds to determine by itself which telephone calls are legally made, and which are illegally made.

As a witness the ever present Mr. H. W. William Caming is right there. There on the last rehearing he testifies, or offers to testify exactly what is necessary

to bring his company's operations within legal limits. In the amicus curiae brief, the telephone company said:

> "We are prepared to show, if the Court should deem it necessary, that after Southern Bell Telephone and Telegraph Company had gathered evidence of Hanna's fraud by wire, Mr. H. W. William Caming of this Company's Legal Department on December 14, 1965 telephoned Mr. Robert D. Peloquin of the Department of Justice and reported only the following: that evidence of electronic toll fraud had been discovered in the southern Florida area, which we would disclose under proper subpoena."

As an advocate, he champions the cause of the financial giants and pleads that the most irreparable of injury — the loss of profit — will occur if the court denies the telephone company the right to wiretap.

CAN THE TELEPHONE COMPANY MONITORINGS OF ILLEGAL COMMUNICATIONS BECOME LEGAL EVIDENCE?

It has in this case.

Hanna stands convicted of interstate gambling activity (18 U.S.C. 1084, 1952) on evidence derived from illegal telephone communications that were recorded by telephone company employees.

At the time Hanna was decided, two circuits had considered the question and reached diametrically opposed decisions. Brandon v. United States, 10 C.A., 382 F.2d 607, 1967, held this evidence to be admissible. Bubis v. United States, 9 C.A., 384 F.2d 643, held this evidence to be inadmissible. The Hanna decision of March 6, 1968, followed Bubis. On November 18, 1968, the fifth circuit reversed the earlier ruling and followed the Brandon ruling, holding the evidence to be admissible. Certiorari review of this opinion is asked in this petition.

Applicability of Katz (Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.ed.2d 576 (1967)

The fifth circuit opinion that followed Bubis and held that the telephone company interception of a telephone conversation could produce no admissible evidence was reversed at the request of the Attorney General. Amongst other representations made to this Court were: That the Katz opinion was authority for the fact that the dime in the slot of a pay telephone was the one factor that guaranteed the caller the constitutional protection of his right to privacy, and that the absence of this payment to a private telephone company gave the government — and the owner of the telephone — the right to listen to every conversation, record same and, if incriminating, to produce it in a court of law as evidence against the non-payer.

This preposterous interpretation of the Attorney General follows from the following excerpt from Katz:

> "One who occupies (a telephone booth) shuts the door behind him and pays a toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."

The Attorney General, having thus disposed of the Katz application, then informed the fifth circuit that they were bound by Sugden vs. United States, 9 C.A., 226 F.2d 281. Affirmed in per curiam, 351 U.S. 916 (1956). This is a case in which government officials monitored unlicensed radio transmission and discovered another crime. This 1955 interception of a radio transmission was, and probably still is, admissible evidence.

The current fifth circuit opinion on rehearing rests squarely on the Sugden case.

To this petitioner replies: The difference between a radio broadcast and a telephone conversation demonstrates the thought and reasoning behind the quotation from Katz. A broadcast turns loose in the atmosphere a communication. It is there for anyone to witness, and certainly government investigators are at liberty to witness and report what they heard. A telephone conversation, on the other hand, is almost behind closed doors. It is momentarily within a wire circuit that ordinarily no one would expect would be broken — that is, intercepted. But this is the case here. And the interceptor is not the government, but the private telephone company, who may, if not stopped by law, intercept any private telephone conversation on the assumption

that they are looking for the one caller who did not pay the tariff. Even more significant is the judicial function assigned to the private telephone company. If they determined that the call is illegal, then they intercept and divulge freely any and all evidence that their snooping has uncovered.

The misinterpretation of Katz is even more flagrant when it is noted that Katz is a "bugging" case and not a wiretap matter, and that it guarantees the right of privacy to individuals and not to places. Katz and Berger add the broadest fourth amendment constitutional dimensions to the right of the individual to his privacy. Berger v. New York, U.S., 18 L.ed.2d 1040, 87 S.Ct. Petitioner believes this right of privacy belongs to all men, the guilty and the not guilty, and to the payers and non-payers of telephone bills. The counterfeiter behind closed doors has the right of privacy, as does the non-payer of telephone bills, neither can be denied this privacy except by authority of a lawful search warrant.

The Berger case eliminated all interception and divulgence of telephone communications, except those that could be done under fourth amendment sanctions. Long ago, in Nardone we found that "no one" meant no one may intercept and divulge a telephone communication. Nardone v. United States, 302 U.S. 379, 308 U.S. 338. This is still the law, even after Berger, with the sole exception of the governmental power to issue search warrants under the strict limitations of the fourth amendment.

Petitioner believes that the Constitution, Berger and Katz cannot be ignored and no court should have any difficulty finding that the rights our Constitution guaranteed includes the right to deny the telephone company the authority to overhear any conversation on the pretext that they are looking for non-payers.

It is not difficult under our Constitution to find that the private telephone company has no right to determine which calls are illegal, and therefore, which calls they will overhear and report in ultra vires law enforcement. "Profit" is the motivation of our economy, and admittedly, it is the sine qua non of our private enterprise sysem, yet, petitioner believes that even before the Berger-Katz era under 47 U.S.C. 605 the individual's rights were considered paramount. The famous "unwhipped" quotation from Nardone was reworked by Judge Rives in the first Hanna opinion in the fifth circuit. He said:

> "Adding to the language of the Supreme Court the italicized expressions enclosed in parentheses, we would say the 'Congress may have thought it less important that some offenders should go unwhipped of justice *(and that the telephone company lose some long distance tolls)* than that officers *(or telephone company employees)* should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." 302 U.S. at P. 383. Nardone v. United States, 302 U.S. 379, Second Appeal, 308 U.S. 338.

Constitutionally, in the post Berger and Katz era, this will not be tolerated, and if no other factors were involved, the conviction of Hanna would be a travesty. There are, of course, other considerations. Hanna was stealing long distance service, and under our concept of private enterprise, the telephone company has the right to receive pay and profit for its services.

Hanna, a thief if you will, is protected by the fourth amendment of the constitution of the United States to the same degree as is the chairman of the Board of American Telephone Telegraph Company. To intrude on the privacy of either requires legal process, no less than a search warrant within Constitutional dimensions. But the chairman of the board, or some underling, in effect says: Do you mean to tell me that I cannot look for a thief of the product I sell. Petitioner implores this court to hold that the telephone company must look for their thieves just as any other individual must. They may observe, and they may listen to whatever is in the public domain, but they may not break into a private home, or into a private conversation without lawful authority. Somehow, it seems more constitutionally permissive to force a search, or tap a phone conversation, to look for something stolen from you. But, this is nowhere to be found in our Constitution.

Some real doubt exists as to whether precious space should be devoted to the concern for the loss of long distance revenue for the telephone company. But for the sake of continuity, here is the answer to the ubiquitous question: How do you expect the telephone

company to operate if they cannot check their own lines to see if they are being used by non-paying subscribers. The answer is all over this record: The telephone company had ample evidence that Hanna was stealing long distance service before they even installed a listening device. R. 30-86. This was accomplished electronically by a device known as a peg counter meter. R. 42. The device noted, but did not listen to long distance calls for which the company was not paid. Then and only then, was the tape recorder attached, which for 27 days recorded over 500 telephone calls or segments thereof. R. 43, 44. The intercepted telephone conversations did not produce evidence of non-paid use of the service, but did produce evidence of the Hanna gambling activity.

The point is, the telephone company did not have to listen to the private conversation of Hanna to protect its business interests, and no one deputized American Telephone Telegraph Company or underlings to ferret out the gamblers.

The non-deputy quality of the telephone company is raised not altogether in jest, for it is here emphasized that the communications cartel could not be deputized, they could not do law enforcement and they could not execute a search warrant. It may be summarized thus: The spoken word is evidence when it is spoken over the telephone, it is evidence which is accessible only to law enforcement officers by means of a search warrant. The telephone company, did not, and could not have had a search warrant to monitor the 500 plus Hanna calls.

If a solution for the communication company is still of concern; then, well within the framework of the Communications Act, the peg counter meter data could be recorded, interpreted and used as a probable cause for the issuance of a search warrant that would permit some search of the lines carrying the voice of Hanna. But certainly no court would ever authorize a total or general search to be conducted over a 27 day period. Hanna's private conversations were monitored for 27 days for no reason that was not satisfied by the peg counter meter report. If the peg meter reported a suspected theft, then the telephone company had a right and a duty to report this to lawful authority, who could, since Berger and Katz, investigate further, if they deemed necessary, by lawful search procedures, none of which could include a 27 day surveillance of the Hanna telephone conversations.

Petitioner here concedes the validity of the law that states in the execution of a valid search warrant, the searchers need not overlook contraband, or evidence of other crimes, not contemplated in the basic search. But here, we have a search without a warrant attempted by a private company over a period of time that far exceeds any constitutional limits.

The rationale of Bubis includes at least a reference to the fact that the search of the lines for the conversations of Bubis extended over such a period of time that a search warrant could not validate the search, as an order for an extended surveillance of Bubis telephone conversations would constitute a general search warrant proscribed by our Constitution.

THE FOURTH AMENDMENT AND 47 U.S.C. 605.

This petition complains of the fifth circuit opinion holding that the telephone company monitoring of its own lines in search of non-payers thereof was not only legal, but that the results of this monitoring were admissible evidence. This decision was reached despite the 47 U.S.C. 605 mandate that "no person" shall intercept and divulge "any communication". This is the very section which Nardone said says what it means, and means what it says — even to the extent of saying "no person" means no persons — not even federal agents. Nardone would not make an exception for federal agents, but the fifth circuit would make an exception for telephone officials who had not been paid for the use of their facilities.

This is what we ask this court to review. All of the individual rights so zealously protected by our constitution were amply protected by 47 U.S.C. 605 under the rulings that followed Nardone. Petitioner believes the Nardone interpretation of "no person" includes the telephone company and that even this financial giant cannot ". . . . resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." 302 U.S. at p. 383.

47 U.S.C. 605 with the 1937 Nardone interpretation is thoroughly modern and consistent with present constitutional concepts as to the rights of the individual. The fifth circuit could have accepted the ridiculous Attorney General position — that a dime in the telephone slot guarantees the individual the right of

privacy — and still have reached a proper conclusion. that "no person", not even the unpaid telephone company, may intercept and divulge "any communication." But, they did not.

The Constitution of the United States cannot be ignored. The fourth amendment says that no one shall be subjected to unlawful searches and seizures. Berger overruled Olmsted and held that telephone communications were to be given the protection of the fourth amendment. Katz referred to electronic eavesdropping. Berger referred to wire tapping. This was a wire tap. Hanna's telephone conversations were intercepted and divulged. How, under our system of law, can anyone wiretap — invade the individual's right to privacy — in any way other than by the strictest compliance with the fourth amendment. The telephone company ignored the constitution of the United States and invaded the individual rights of the individual Hanna. No semblance of a warrant and no semblance of constitutional conduct is even suggested. Why — the telephone company and the fifth circuit answer why — Hanna was a thief. He dared to attempt to make a free long distance telephone call. The price of any long distance call can be classified petty larceny. Petitioner is proud to live under a system of laws that will not deny the constitutional rights of an individual, even to a traitor, and we have faith that this court will not allow the fifth circuit to deny the same rights to a petty thief.

Wherefore, the premises considered, petitioner prays that a writ of certiorari issue herein, directed to

the Fifth Circuit Court of Appeals and that, after due proceedings had, that a writ issue to said court, setting aside the judgment or order of said court and the judgment of the district court. Petitioner further prays that a stay order issue herein pending the disposition of this application.

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PROOF OF SERVICE

I, GUY JOHNSON, attorney for petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington 25, D.C. and Mr. William A. Meadows, Jr., United States Attorney, Post Office Building, 300 N.E. 1st Ave., Miami, Florida 33101.

New Orleans, Louisiana, January 24, 1969.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,343

KENNETH HERBERT HANNA and
NATHAN MODELL,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(March 5, 1968.)

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

RIVES, Circuit Judge: This appeal is from judgments of conviction on counts one, four and five of a five-count indictment. Count one was directed against the defendant Hanna, and charged him with violating 18 U.S.C. § 1343 (wire fraud). Counts four and five were directed against both defendants, Hanna and

Modell, and charged them with violating 18 U.S.C. § 1084 (wagering by wire) and § 1952 (using the telephone in interstate commerce to promote an unlawful activity). The defendants were convicted as charged in the three counts, and each was sentenced to six months' imprisonment followed by five years' probation. Hanna was also fined ten thousand dollars. The sentences were to run concurrently.

There was no dispute about the facts, and we adopt (with the exception noted in footnotes 1, 2 & 3, p. 5 *infra*) the statement contained in the Government's brief:

> "In the twenty-seven day period from November 24, 1965, to December 21, 1965 over 500 telephone calls were placed from defendant Hanna's phone to a distant information operator (e.g. 1-area code-555-1212) (R. 35). This was discovered during an investigation of Hanna's phone conducted solely by the American Telegraph and Telephone (sic) Company and its subsidiary, Southern Bell Telegraph and Telephone (sic) Company. Hanna's phone had become the focus of an investigation by the telephone company after an official of the company in New York detected an unusual condition on Miami phone number 945-9723. He notified Gerard Doyle, Security Manager of Southern Bell Telegraph and Telephone (sic) Company, of this unusual condition and that the condition indicated that

in all likelihood a device known as a 'blue box'[1] was being used on the line. (R. 34, 295).

"[1] A 'blue box' is technically known as a multi-frequency signal generator. It enables a caller to by-pass the toll equipment of the telephone company and complete long distance calls without any record of the call being made. Thus, the caller avoids being billed for all calls placed while using a 'blue box'. (R. 35, 295).

"To operate a 'blue box' a person dials any number through his regular telephone which would provide access to the toll network (e.g. 1 area code-555-1212). Once this connection is established he is able to disconnect the number he has called by inducing on the line a 2600 cycle tone from his 'blue box'. Then by pushing buttons on his 'blue box' he is able to send sounds into the toll network corresponding to the sounds assigned to the digits in the called number and reach any number he desires without any reflection on his bill other than the original free call (R. 35, 36, 69).

Doyle investigates toll frauds for the telephone company. Doyle knew from experience that bookmakers use these devices. (R. 40-42, 295). So when he discovered that 945-9723 was subscribed to by Kenneth Hanna, whom Doyle knew to be a local bookmaker (R. 40, 295),

he instructed company engineer, Ray Fowler, to determine if the unusual condition was a 'blue box'. On November 24, 1965 Fowler attached a piece of electronic equipment to Hanna's line capable of sensing a 2600 cycle tone originating at the subscriber's telephone. (R.42).[2] It was attached to Hanna's line be-

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"[2] Normally the 2600 cycle tone originates from a toll office within the long distance network and is not found on a subscriber's line. (R. 42). If a 2600 cycle tone does appear on the subscriber's line fairly often, it is a highly unusual situation suggesting that a 'blue box' is being used. (R. 44, 81). This is because a 'blue box' emits a 2600 cycle tone and although a 2600 cycle tone is within the upper reaches of the audible range (e.g. a high pitched scream) the frequent appearance of such a tone on the subscriber's line is very unlikely. (R. 64, 83).

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fore the line reached the toll network. (R. 66). Each time the detection unit sensed a 2600 cycle tone it activated a 'peg counter meter' which is simply a counting device for totalling the number of times a 2600 cycle tone is perceived by the detection unit. (R. 42, 80, 41).

"That night Fowler called Doyle and indicated that the counter was registering. (R. 43). Doyle then advised him to put a tape

recorder on Hanna's line to record the sounds made by the 'blue box'. (R. 43, 80, 82). The tape recorder was unattended and was set to cut off automatically 35-45 seconds after being activated by the 2600 cycle tone on the subscriber's line. (R. 43, 44).[3] Fowler was

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"[3] The placing of a recorder on the line was necessary to determine whether the telephone company was being defrauded. This is because although the appearance of a 2600 cycle tone on subscriber's line is unusual it is nonetheless possible that a high pitched scream could approximate 2600 cycles. (R. 64). Only by having a tape recorder on the line could the company determine the source of any 2600 cycle tone appearing on Hanna's line. (R. 81-83). Because the company's only interest was in toll fraud it was concerned with establishing two items; first, that the 2600 cycle tone on Hanna's line originated from his line by a 'blue box' and, second, a connection was completed. (R. 43, 44). Thus the tape recorder operated only for 35-45 seconds on each call. Naturally, the tape was made to preserve the evidence of fraud.[1]

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[1]We have some reservations as to the facts and conclusions set forth in the Government's footnote 3, which we discuss in footnote 15. The accuracy or inaccuracy of those facts and conclusions would not, in our opinion, affect the decision of this case.

certain that a 'blue box' was being used and notified Doyle. (R. 45, 46, 83, 84). The detection unit, counter and unattended recorder remained on Hanna's line sporadically for twenty-three of the next twenty-six days until on December 21, 1965, Doyle received a subpoena directing him to produce all the recordings before a Federal Grand Jury in Philadelphia, Pa. (R. 46-49, 296). He appeared the following day and turned the tapes over to the Grand Jury. (R. 57). This is the first time anyone in the Federal Government had knowledge that Hanna's line was being monitored. (R. 50).[2] Attorneys for the United States Department of Justice handling the Philadelphia Grand Jury turned the tapes over to the Federal Bureau of Investigation. The tapes were in turn given to Special Agent William

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[2]The truth vel non of this sentence would not affect our decision. However, for the sake of accuracy, we note that we do not agree with this statement. It is based on the testimony of one telephone company employee to the effect that that was his first contact with any Government agency. Asked if he knew how the Government got the information that he had these tapes in his possession, he testified, "No, sir, I do not. But I will say this: during the course of this case my superiors were constantly being informed of the progress of the case on a weekly basis. But I had no contact with any federal agent or agency." The only reasonable inference to be drawn is that prior to the issuance of the subpoena duces tecum, the existence and some inkling of the contents of the communications were disclosed to the Government by some telephone company employee. The Government virtually admits as much in its supplemental brief, p. 7: " * * * if such disclosure is not permitted it is inconceivable to perceive how the Grand Jury or other lawful authority would learn of the existence of the records which the statute allows them to demand."

Heist in Miami who contacted Doyle on December 30, 1965. (R. 61). This is the first time Doyle was ever contacted by an agent of the Federal Government relating to this matter (R. 50, 51, 61, 94) and he never did tell anyone outside the Grand Jury what was on the tapes. (R. 57)."[3]

"Based on the conversations contained in the tapes, Heist and Special Agent Maurice Roussell obtained a search warrant for Hanna's home and an arrest warrant for his person. (R. 91). Heist also determined that defendant Modell was one of the people called by Hanna in New York City. (R. 87, 92, 160). Because the conversations between Hanna and Modell revealed they were engaged in the use of interstate facilities in aid of bookmaking, as they later admitted by stipulation, arrest and search warrants were also issued against defendant Modell and his apartment. On January 8, 1966, agents of the Federal Bureau of Investigation executed the warrants and bookmaking paraphernalia was seized at both places. The 'blue box' was seized at Hanna's residence. (R. 100)."

We adopt also the further statement contained in the brief for appellants:

"* * * * The tape recordings and gambling

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[3]We accept these statements subject to the qualification in our footnote 1, *supra*.

paraphernalia constituted all the evidence against the defendants in the instant case (R. 294).

"The defendants filed a pre-trial motion to suppress the tape recordings, bookmaking paraphernalia and the 'blue box' on the ground that they were obtained in violation of 47 U.S.C. § 605, and the Fourth Amendment to the United States Constitution (R. 178-179). The lower court denied the motion and filed a written opinion which is now recorded at 260 Fed.Supp. 430 (S.D. Fla. 1966) (R. 292-293, 294, 306). The lower court adjudged the defendants guilty based on the evidence sought to be suppressed in this case (R. 314-315).

"The defendant Hanna moved to dismiss the first count of the indictment on the ground that it failed to state an offense under 18 U.S.C. § 1343 (R. 227-228). The lower court denied the motion (R. 293)."

In accordance with Fifth Circuit Rule 24—2(b), the appellants filed the following:

"SPECIFICATION OF ERRORS RELIED UPON

"I

"THE LOWER COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO SUPPRESS (a) THE TAPE RECORDING OF

THE DEFENDANTS' MONITORED TELEPHONE CONVERSATIONS AND (b) GAMBLING PARAPHERNALIA FOUND IN CONSEQUENCE THEREOF, ON THE GROUND THAT THE EVIDENCE WAS SECURED IN VIOLATION OF 47 U.S.C. § 605.

"II

"THE LOWER COURT ERRED IN DENYING THE DEFENDANT HANNA'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT ON THE GROUND THAT SAID COUNT OF THE INDICTMENT FAILED TO STATE A CRIME UNDER 18 U.S.C. § 1343."

The second specification may be disposed of summarily. If the first specification is sustained, both judgments of conviction must be reversed entirely. If the first specification is not sustained, the judgments must be affirmed. Since the sentences were to run concurrently, it is not necessary to consider questions raised with respect to any one count.[4]

Thus our consideration is limited to the question of whether the defendants' motion to suppress the tape recordings, bookmaking paraphernalia and the "blue box" should have been sustained because they were obtained in violation of 47 U.S.C. § 605.[5] That ques-

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[4]Hirabayashi v. United States, 1943, 320 U.S. 81, 85; Mishan v. United States, 5 Cir. 1965, 345 F.2d 790, 791.

[5]"§ 605. *Unauthorized publication or use of communications*

"No person receiving or assisting in receiving, or transmit-

tion may be further limited to: "Was the evidence obtained as a result of violating 47 U.S.C. § 605?"[6]

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ting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

[6]See Nardone v. United States, 1937, 302 U.S. 379; on second appeal, 1939, 308 U.S. 338; Weiss v. United States, 1939, 308 U.S. 321; Goldman v. United States, 1942, 316 U.S. 129; Benanti v. United States, 1957, 355 U.S. 96; Rathbun v. United States, 1957, 355 U.S. 107.

Four other district courts have held that similar evidence was not obtained in violation of the statute.[7] Of two very recent cases at the appellate level, one has agreed with the district courts while the other has held the evidence inadmissible.[8] We agree with most, but not all, of the opinion of the Ninth Circuit in *Bubis, supra* note 8, and we think that its decision that the evidence was inadmissible is in accord with the opinions of the Supreme Court cited in footnote 6, *supra*.

The *Bubis* opinion follows the dichotomy of section 605 employed in the first *Nardone* opinion:

> "Section 605 of the Federal Communications Act provides that no person who, as an employe, has to do with the sending or receiving of any interstate communication by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to authorized fellow employes, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority; and 'no person not being authorized by the sender shall intercept any communication and divulge or

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[7]See Beckley v. United States, N.D. Ga. 1966, 259 F.Supp. 567; United States v. Benjamin Lassoff, No. 28247, E.D. La., 1962; United States v. Henry Loman, et al., No. 36270, S.D. Cal., July 1966; United States v. Thomas McCay, et al., No. 66-76-CR, W.D. Okla., June 1966. Only *Beckley, supra*, and the instant case are reported.

[8]Brandon v. United States, 10 Cir. 1967, 382 F.2d 607; Bubis v. United States, 9 Cir. 1967, 384 F.2d 643.

publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . .' Section 501 penalizes wilful and knowing violation by fine and imprisonment.

"Taken at face value the phrase 'no person' comprehends federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning *intercepted messages* with that relating to *those known to employes* of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena." (Emphasis added.) 302 U.S. at 380, 381.[9]

To include telephone security personnel charged with the detection of fraud on the carrier within the class of employees receiving or transmitting communications would require too strained a construction. In a broad sense all telephone employees assist in receiving or transmitting communications, for

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[9]Also in Weiss v. United States, *supra* note 6, the Court employed a like dichotomy:

"The section consists of four clauses separated by semicolons. The pertinent one is the second: 'and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;'." 308 U.S. at 327.

that is the end result of the telephone company's business. But, as the first *Nardone* appeal indicates (see 302 U.S. 381), this first clause of section 605 has reference to those employees to whom the communications necessarily become *known*. In fact, here the communications were sent and received by means of direct dialing without the use of a telephone central or other employee. There were *no* employees or persons whose transmitting and receiving duties permitted them to learn the contents of the telephone conversations. The first clause of section 605 therefore has no application to the facts of this case.[10]

Parts of the telephone conversation were "intercepted" and their admissibility must be determined by reference to the second clause of section 605. The second clause is the most positive and explicit language: "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." That clause simply means what it says and says what it means. The first *Nardone* case, *supra* note 6, refers to it as a "plain mandate" (302 U.S. at 383), and holds that "no person" embraces federal agents engaged in the detection of crime. A fortiori that expression embraces the security personnel of a telephone company.

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[10]If we held otherwise, we would then reach the question pretermitted by the Supreme Court in *Benanti*, *supra* note 6, 355 U.S. at 100, n. 5, and in *Rathbun*, *supra* note 6, 355 U.S. at 108, n. 3, as to whether both an interception and a divulgence are necessary for a violation of section 605.

That is made more certain when we turn from the literal language of section 605 to its purpose and intent as stated in the first *Nardone* appeal:

> "It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution." 302 U.S. at 383.

Again, the second *Nardone* case referred to the first, as follows:

> "That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with

> ethical standards and destructive of personal liberty.' 302 U.S. 379, 383." 308 U.S. at 340.

Adding to the language of the Supreme Court the italicized expressions enclosed in parentheses, we would say the "Congress may have thought it less important that some offenders should go unwhipped of justice *(and that the telephone company lose some long distance tolls)* then that officers *(or telephone company employees)* should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

There is some suggestion that, by his illegal use of the telephone company facilities, Hanna impliedly "authorized" the interception of any communication. That position is untenable. It would justify the violation of the secrecy of communication by the results obtained from the violation. By analogy to the search and seizure cases under the Fourth Amendment that is, of course, impermissible.[11] If sound, that suggestion need be but slightly modified to render admissible in evidence all intercepted telephonic communications having to do with the planning or effectuation of crime. In discussing the phrase "authorized by the sender," the Supreme Court has said: "The Act contemplates voluntary consent and not enforced agreement to publication." *Weiss v. United States, supra* note 6, 308 U.S. at 330.

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[11]See Byars v. United States, 1927, 273 U.S. 28, 29.

The Government's main thesis is thus expressed in brief:

> "The crux of this appeal is whether trespassers on the facilities of a communications common carrier and thieves of its services are entitled to the privacy afforded by Title 47, U.S.C. § 605. Common sense dictates that Congress did not intend to protect trespassers and thieves."

That seems to be the basis of the Tenth Circuit's decision in *Brandon, supra* note 8, when that Court says:

> "That provision was adopted by Congress for the protection of authorized users of telephonic or radio facilities; it was not intended as a refuge for the wrongdoer who uses the telephone in a scheme to violate the wire fraud statute." 382 F.2d at 611.

We do not agree.

As the Supreme Court pointed out in both *Nardone* appeals, Congress intended to protect "against practices and procedures violative of privacy," and against "methods deemed inconsistent with ethical standards and destructive of personal liberty." (302 U.S. at 383.) If the protection of the law abiding requires the protection of all telephonic users including "trespassers and thieves" and other criminals, the answer is that

it is for Congress to declare which is the more important policy.

The Government's attempted analogy between persons attempting to defraud the carrier of its long distance tolls and trespassers on land is patently unsound. The argument need be but slightly changed to treat as "trespassers" all persons using or misusing the telephone to plan or effectuate crime. If not, the argument would result in attaching more importance to a minor fraud than to the most heinous felony. Such a construction would render the statute no longer "a plain mandate."[12] The argument would permit telephone company personnel to conduct pervasive wire tapping invasive of the privacy of the lawless and law-abiding alike, and then to make use of the fruits of their conduct in those cases in which the results showed that one of the parties to the telephone conversation was attempting to commit a fraud on the telephone company.[13] Incidentally, the Government's position takes no account of the user at the other end of the line who may be innocent of that particular type of criminality. In the present case, there is no evidence that Modell knew that Hanna was using a blue box.[14]

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[12]"Moreover, as the second *Nardone* decision asserts, distinctions designed to defeat the plain meaning of the statute will not be countenanced. 308 U.S. 338, 340." Benanti v. United States, 1957, 355 U.S. 96, 100.

[13]See footnote 11, supra.

[14]It is significant that in *Katz v. United States,* U.S. No. 35, Oct. Term, 1967, decided December 18,1967 (after this opinion had been drafted and circulated among the Judges), the Government was permitted to introduce evidence of *Katz's end* of the

Basically, the Government's argument in this case is but a watered down version of its argument in *Nardone* and the subsequent cases cited in footnote 6, *supra*. The Supreme Court has consistently rejected the Government's position, and we can do no less.[15]

As indicated in footnote 14, *supra*, this opinion had been drafted and circulated among the Judges before the Supreme Court's decision on December 18, 1967 of *Katz v. United States*. That decision goes much further than to reinforce our view that the tape recordings were inadmissible against Modell. It makes clear that they were entirely inadmissible. There the

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telephone conversations. There was apparently no effort to introduce evidence of the other end, which would correspond here to Modell's end of the conversations.

[15]We have not discussed, but neither have we failed to consider, the plight of the telephone company. We recognize that, as a public utility, it had not only the right but the duty to require payment of the long distance tolls prescribed in its tariffs. If this decision renders the performance of that duty more difficult, our answer is that the policy is for Congress to declare. However, we are not convinced that the telephone company will be seriously impeded. As previously indicated (*ante*, note 1), we do not accept at face value all that the Government says in footnote 3 to its brief. It seems to us that the use of the blue box detection unit with the peg counter meter, *but without the tape recorder*, would have given the telephone company adequate protection. With information thus lawfully obtained, a routine inspection might have resulted in the discovery and removal of the blue box. The telephone company might also have reported to appropriate governmental authority the probable commission of a crime, following which the Government might have obtained a search warrant for the electronic search, as now authorized by the recent *Katz* decision referred to in footnote 14, or even for the blue box itself. A search warrant is of course not available to the telephone company. See 47 Am.Jur., Searches and Seizures, § 4, p. 504, §56, pp. 536, 537; 79 C.J.S., Searches and Seizures, §63, p. 825.

Supreme Court definitely overruled *Olmstead v. United States,* 1928, 277 U.S. 438, which was the occasion for the enactment of the statute now carried forward as 47 U.S.C.A. § 605.[16]

Olmstead being overruled, section 605 may not now appear necessary. Certainly the statute cannot authorize a violation of the Fourth Amendment as now declared in *Katz, supra.* Section 605 cannot authorize the telephone company employees to obtain evidence through surveillance which becomes under *Katz* standards an unconstitutional search; nor can the Government by subpoena duces tecum make use of such evidence. *Katz* points out the constitutional procedure as the time-honored method of obtaining a search warrant.[17] Moreover, the fact that a search warrant is not available to the telephone company[18] adds emphasis to the illegality, indeed unconstitutionality, of its surveillance which amounted to a search without a warrant.

The district court erred in denying the Government's motion to suppress the tape recordings of the defendants' monitored telephone conversations and the gambling paraphernalia found in consequence of those tape recordings. The judgment is therefore reversed with directions to render judgment discharging the defendants.

REVERSED WITH DIRECTIONS.

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[16]See Nardone v. United States, *supra* note 6, 302 U.S. at 382, 383; Rathbun v. United States, *supra* note 6, 355 U.S. at 111, 112 (concurring opinion of Justice Frankfurter).

[17]See particularly footnote 16 to Katz v. United States, *supra.*

[18]See authorities cited at end of footnote 15, *supra.*

GODBOLD, Circuit Judge, specially concurring:

I concur in the result.

As Judge Rives notes (footnote 2 of his opinion) the only reasonable inference is that prior to the issuance of the subpoena duces tecum the existence and some inkling of the contents of the communications were disclosed to the government by telephone company employees. Under no construction of § 605 is this proper.

The wiretap was installed on Hanna's telephone on November 24, 1965. It remained there to December 21, although the telephone company knew within a day or two of installation that Hanna was using a device to bypass the telephone company's long distance toll equipment. Whatever right the telephone company may have to determine the existence of communications[1] or the content of communications is limited by standards of reasonableness which were exceeded in this case. *Bubis v. U. S.*, 384 F.2d 643 (9th Cir. 1967).

For these reasons, and these alone, I agree that these cases must be reversed.

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[1]Judge Rives' opinion focuses on the content of a communication. Sec. 605 refers also to divulging the existence of a communication, which may be done by mechanical devices that do not record the content. But I assume that such devices would be installed by and read by persons who are not in the status of the old-fashioned "central."

HUGHES, District Judge, dissenting.

I respectfully dissent from the majority and would affirm the judgment of the trial court.

I agree with the majority that "our consideration is limited to the question of whether the defendants' motion to suppress the tape recording, book-making paraphernalia and the 'blue box' should have been sustained because they were in violation of 47 U.S.C. sec. 605." In my opinion the evidence was not obtained as a result of violating 47 U.S.C. sec. 605 and the trial court was correct in overruling defendants' motion to suppress.

By enacting the first clause of section 605, Congress recognized the special position of the carrier's employees. This clause does not proscribe the interception of communications by a ". . . person . . . assisting in receiving . . . or assisting in transmitting . . . ." Apparently, the majority interprets this phrase to include only employees who in actually placing the call obtain knowedge of the communication. In my view such a restrictive construction is contrary to the intent of Congress.

Section 605 was enacted in 1934, long before it was technically possible for toll-charge telephone calls to be completed without the assistance of some human agency. At that time an operator's "interception" was necessary in order properly to assess toll charges for long distance calls. In recent years the company has developed a means of placing and assessing charge

without the aid of an operator. The new system, while affording a greater measure of privacy to the user than the old system, provides less security to the telephone company, since by using a 'blue box' a caller may electronically circumvent the new billing system.

In an effort to combat this practice and thus be assured of compensation for the use of its lines, the telephone company has had to take certain security measures. Since the 'blue box' emits a 2600 cycle tone when in use, the company has developed a means of electronically sensing its emission. The frequent appearance of such a tone on a particular line is a strong indication that a 'blue box' is being used. Before any degree of certainty can be achieved, however, it is necessary to have more substantial evidence. This is obtained by the company's security personnel attaching a tape recorder to the suspected line to verify that a 'blue box' is in fact being used.

I would interpret the first clause of section 605 to include security officers as well as other employees of the carrier who are engaged in keeping the business of telecommunications functioning properly. The operator is only one of many employees who in the proper exercise of their duties necessarily must "intercept" transmissions. In view of recent inventions, it is irrational to differentiate the legal effect of the operator's function from that of the security personnel. To some extent the security officer has taken over the function of the operator in making certain that toll charges are properly assessed. Consequently, the statute should apply to him in the same way as it

formerly did to the operator. Otherwise, the carrier, by using an electronic complex for the purpose of assessing charges, has lost the right of interception which formerly he had.

Since it is my opinion that a security officer, in the light of present day developments, should be included among company employees engaged in the transmission of communications, information obtained by him in the regular course of his duties with the telephone company can be divulged, if done in accordance with the conditions set forth in the first clause of the statute, *viz.* ". . . in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority . . . ." The testimony in this case reveals that the manner of divulgence was in accordance with this provision of the statute, as is set forth in the statement of the facts in the majority opinion. Thus the first clause of section 605 does not prohibit the introduction into evidence of the tape recording.

The second clause of section 605 covers persons other than employees ". . . assisting in transmitting . . . ." It provides that ". . . no person not being authorized by the sender shall intercept . . . and divulge . . . the contents . . . of such intercepted communication." In my opinion the transmissions here under scrutiny are not entitled to the protection of this clause of the statute.

The telephone calls between Hanna and Modell were intrinsically illegal transmissions. It is not their con-

tent which made them so, but the fact that Hanna and Modell were fraudulently using the lines without paying for their use. The majority assumes that Congress intended to protect against the monitoring and divulgence of fraudulent transmissions as well as legal ones, but I am unable to make that assumption.

No worthwhile purpose is served by protecting the secrecy of such transmissions, and to do so would seriously inhibit their detection. It is difficult to believe that Congress intended that outlaw transmission should have protection. "It is," as stated in *Brandon v. U. S.*, case No. 9395, August 29, 1967, 10th Circuit, "contrary to common sense."

The leading case which sustains the view that, if the use of a communication facility is illegal, the right of privacy does not exist and the matter may be divulged, is *Sugden v. U. S.*, 226 F.2d 281 (9th Cir. 1955) affirmed per curiam, 351 U.S. 916, 76 S.Ct. 709.

Sugden involved the interception and monitoring of radio transmissions by federal agents. Information obtained in this manner was used as evidence in prosecuting defendants for violation of the immigration laws. Although defendants were not licensed operators and were not thus legally on the air, they sought to interpose section 605 in a motion to suppress the evidence. The trial court granted the motion and dismissed the indictment, but the Ninth Circuit reversed, holding that because the defendants were not legally using the station the statute had no application. The Court declared:

> . . . To throw a mantle of protection provided by Section 605 over an outlaw broadcast is to abandon reason . . . . Giving the one who broadcasts without authority any protection under Section 605 could not tend to protect the means of communication.

The case of *Brandon v. U. S., supra,* likewise sustains this view. In that case the defendants were accused of conspiring to defraud the Southwestern Bell Telephone Company in the use of long distance telephone service and facilities. The means of detection were similar to that used in the present case. The Court in holding that section 605 did not prohibit the use of information obtained by monitoring said:

> (Section 605 . . . was adopted by Congress for the protection of authorized users of telephone or radio facilities; it was not intended as a refuge for the wrongdoer who uses the telephone in a scheme to violate the wire fraud state.

The majority suggests, assuming *arguendo* that the tapes are admissible against Hanna, that they cannot be introduced against Modell because there is no evidence that he participated in the wire fraud, citing *Katz v. United States,* U.S. No. 35, Oct. Term, 1967, decided December 18, 1967, as controlling. However, I do not believe Katz to be analogous. That case censured eavesdropping by *federal agents* as constituting a violation of the defendant's Fourth Amendment rights against unlawful search and seizure. But

the Fourth Amendment is no bar to eavesdropping by persons such as these telephone company employees; it applies only to acts of the government. *Burdeau v. McDowell,* 256 U.S. 465. The evidence demonstrates that the government played no part in the "interception" here complained of. Moreover, since I find no violation of Sec. 605 in obtaining and divulging the statements of Modell, there is no legal impediment to their admissibility against him.

For the reasons stated I would affirm.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,343

KENNETH HERBERT HANNA and
NATHAN MODELL,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(April 17, 1968.)

ORDER GRANTING REHEARING

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The panel of this Court, before which this case was heard, on its study of the appellee's petition for rehearing en banc concludes to grant rehearing before said panel, to be submitted on briefs.

It is therefore ORDERED that rehearing before the panel of this Court which heard the case on original hearing is hereby granted, to be submitted on briefs; the appellee's brief to be filed within twenty (20) days from the date of the filing of this order and the appellants' brief to be filed within fifteen (15) days from the date of the receipt of copy of appellee's brief on rehearing. The Court suggests that the briefs to be filed may freely refer to briefs already on file and avoid unnecessary duplication. Briefs need not be printed but at least four (4) legible copies shall be filed with the Clerk.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,343

KENNETH HERBERT HANNA and
NATHAN MODELL,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(November 18, 1968)

ON REHEARING

Before RIVES and GODBOLD, Circuit Judges,
and HUGHES, District Judge.

RIVES, Circuit Judge: On original hearing,[1] Judge Rives wrote what was intended to become the opinion

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[1]Opinion reported in 393 F.2d 700.

of the Court. Judge Godbold concurred specially, and Judge Hughes dissented. On further consideration, it appears that Judge Rives' original opinion is in error both as to the facts and as to the law.

The factual errors are contained in footnotes 2 and 15. The inference was mistakenly drawn "that prior to the issuance of the subpoena duces tecum, the existence and some inkling of the contents of the communications were disclosed to the Government by some telephone company employee."[2] It now appears that that inference is unwarranted since it does not follow from the evidence that either the existence or the contents of the communications were unlawfully disclosed. Indeed, the telephone company's explanation of the disclosure in its amicus curiae brief is entirely consistent with the evidence:

> "We are prepared to show, if the Court should deem it necessary, that after Southern Bell Telephone and Telegraph Company had gathered evidence of Hanna's fraud by wire, Mr. H. W. William Caming of this Company's Legal Department on December 14, 1965 telephoned Mr. Robert D. Peloquin of the Department of Justice and reported only the following: that evidence of electronic toll fraud had been discovered in the southern Florida area, which we would disclose under proper subpoena.

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[2]That erroneous inference was expressly relied on by Judge Godbold in his concurring opinion. *See* 393 F.2d at 708.

> "Thus, no disclosure whatever, within the meaning of § 605, as made to the Government prior to Mr. Doyle's appearance before the federal grand jury on December 22 in response to its subpoena duces tecum (R. 50). *Not only was there no prior disclosure of the existence or contents of any particular communication, but also neither the suspect's name, occupation, nor telephone numbers were divulged.*" (Emphasis in the original.)

While Hanna and Modell are not bound by that statement, it does establish the incorrectness of the inference, and Hanna and Modell cannot reap any benefit from that mistaken inference. Of course, the burden of showing prejudicial error is upon the party attacking the judgment.[3]

In footnote 15 to Judge Rives' original opinion, he digressed to explain why he did not think that the telephone company necessarily had to record any parts of the conversations in order to perform its duty to require payment of the long distance tolls prescribed in its tariffs. The telephone company's explanation of its statutory duties and of its procedures in meeting those duties demonstrates the necessity for it to record limited parts of the conversations in order to require payment of the long distance tolls for illegal calls:

> "No carrier can discriminate between its customers by extending preferential treatment

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[3]Neubauer v. United States, 8 Cir. 1958, 250 F.2d 838, 839; Hall v. Texas & N.O. Ry. Co., 5 Cir. 1962, 307 F.2d 875, 876.

to any. 47 U.S.C. §§ 202, 203(c). Knowingly to allow those committing electronic toll fraud to receive free service would constitute such discrimination. Furthermore, each carrier is enjoined, under pain of criminal penalty, not to neglect or fail to maintain correct and complete records and accounts of the movements of all traffic over its facilities. 47 U.S.C. § 220. Each carrier is also obliged to collect the federal excise tax levied upon each long distance call. 26 U.S.C. § 4251. . . .

". . . there is no alternative at this state of the art but to make a limited recording of each illegal call - at least of the fraudulent dialing and opening salutations-to:

(i) identify the calling party (the user of the blue box), and others with whom he may be acting in concert . . . identification of the telephone line from which the fraudulent calls are originating must be followed by the more difficult identification of the specific individual making the calls - this is, of course, of paramount importance;

(ii) establish the location from which the calls are originating;

Most blue boxes, for example, are not cumbersome installations but rather, portable devices (some as

> small as a pack of cigarettes) which can be readily attached to telephone wires by alligator clips.
>
> (iii) record the multifrequency tones being 'dialed' (key pulsed) by the blue box; and
>
> (iv) determine whether the fraudulent call was completed (by the called party answering). (R. 63, 68-70, 81-84, 35-36, 42-45.)
>
> "Distance (as well as time) is a factor in determining the proper billing charge for a long distance call. It is, therefore, necessary to ascertain each specific location called after the wrongdoer seizes the circuit."

Since it is not shown that the telephone company did more than was necessary for it to comply with the duties imposed by 47 U.S.C. § 220 and 26 U.S.C. § 4251, it does not appear that it exceeded the standards of reasonableness as Judge Godbold had originally thought.[4] Again, the burden of showing prejudicial error has not been sustained by the parties attacking the judgment.[5]

As to the law, Judge Rives' original opinion was in error in not recognizing what Judge Hughes expressed so clearly in her dissenting opinion:

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[4]*See* concurring opinion, 393 F.2d 708.
[5]See footnote 3, *supra*.

> "The leading case which sustains the view that, if the use of a communication facility is illegal, the right of privacy does not exist and the matter may be divulged, is *Sugden v. U. S.*, 226 F.2d 281 (9th Cir. 1955) affirmed per curiam, 351 U.S. 916, 76 S.Ct. 709."

393 F.2d at 709.

This Court is bound by the decision in *Sugden* because it was affirmed by the Supreme Court in a terse per curiam: "The judgment is affirmed." 351 U.S. 916. The judgment thus affirmed is summarized in the last paragraph of the opinion of the Ninth Circuit as follows: "The orders dismissing the causes and suppressing evidence are reversed for proceedings not inconsistent with this opinion." 226 F.2d at 286. That opinion had explained that the operators were not licensed until September 17th, "Therefore, they were not legally using the station before September 17th." The opinion had expressed the view, "that the trial court should re-examine the motions of defendants on the basis that free use of any radio communications made before September 17th can be made. The district court will need a new hearing before ruling on the suppression of evidence and quashing the indictment." 226 F.2d at 285. Clearly, in affirming the judgment the Supreme Court placed its stamp of approval on that much of the opinion. Indeed, that was the only part of the opinion adverse to the defendants at whose instance certiorari was granted. 350 U.S. 952.

No sound distinction as to the applicability of section 605 can be drawn between wire and radio. The original statute, written in almost identical terms, applied only to radio communications. Act of Feb. 23, 1927, ch. 169, § 27, 44 Stat. 1162, 1172. Those provisions were extended to wire communications by section 605 without any distinction being made between the two methods of communication. It must, therefore, be conceded that when the use of the communication facility itself is illegal, section 605 has no application, at least insofar as concerns the person guilty of such illegal users. Whatever, we might otherwise think, this Court is bound by the *Sugden* decision. Section 605 being inapplicable as to Hanna, the district court properly admitted against him the tape recordings and gambling paraphernalia found as a result of those recordings.

As to Modell, the case may stand differently. In *Sugden, supra,* the Ninth Circuit commented that, "It seems none [no license] is required for the operator of the mobile end of the two way radio apparatus." 226 F.2d 282. That operator, however, was not a defendant, and there was thus no holding that any evidence of the conversation would be admissible against him. Here Modell is a defendant, and, concededly, there was no proof that he knew that Hanna was using the telephone illegally.[6] Since Modell, in the imagery of *Sug-*

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[6] In the district court the United States Attorney unequivocally conceded: "As far as Mr. Modell is concerned, we certainly concede that there is absolutely no proof that he was using one of these blue boxes and there is no proof even that he knew a blue box was being used." If Modell had also been a trespasser on the line, the probability is that he would have been using a

den, 226 F.2d 285, was "legally on the air," section 605 applied as to him.

There was, however, no violation of section 605 in obtaining and divulging the statements of Modell *if* the telephone company employee who learned of the communications and thereafter divulged their existence and contents was, within the meaning of the first clause of section 605, "a person . . . transmitting, or assisting in transmitting," the communication. Further consideration has persuaded Judges Rives and Godbold to agree with Judge Hughes that, under the circumstances of this case, "a security officer, in the light of present day developments, should be included among company employees engaged in the transmission of communications." That is true because the obligations imposed upon the telephone company by the Communications Act and the Internal Revenue Laws, 47 U.S.C. §§ 202, 203, 220; 26 U.S.C. § 451, both authorized and required it to discover the existence and parts of the contents of the illegal calls. Under those laws, such discovery becomes a part and parcel of the transmission of the communications. Section 605 provides that information thus lawfully obtained may be

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"black box." The witness Doyle testified as follows:

"THE COURT: What is a black box as distinguished from a blue box?

"THE WITNESS: A black box is also an electronic device. It is placed on the terminating end to the telephone call. The black box, in effect, shows our toll billing network that that telephone call was never answered, when, in fact, it was answered and people talked. That is the basic difference."

There was no proof that a "black box" was placed on Modell's end of the line.

divulged "in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority." It now appears that the existence and parts of the contents of the communications were both lawfully obtained and lawfully divulged, and that there was no violation of section 605. Hence, the district court properly admitted against Modell the tape recordings and gambling paraphernalia found as a result of those recordings.

The judgments of conviction of both Hanna and Modell are therefore

AFFIRMED.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,343

KENNETH HERBERT HANNA and
NATHAN MODELL,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING EN BANC

(December 30, 1968)

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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337-569—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 983

KENNETH HERBERT HANNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. C) is reported at 404 F. 2d 405. Its initial opinion (Pet. App. A) is reported at 393 F. 2d 700. The opinion of the district court is reported at 260 F. Supp. 430.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1968. A petition for rehearing was denied on December 30, 1968. The petition for a writ of certiorari was filed on January 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person who fraudulently uses an electronic device to gain illegal access to the telephone company's long distance circuits in order to avoid its billing recordation equipment has a statutory or constitutional right to have suppressed evidence obtained by the telephone company's use of a recording device to record automatically the first 35 to 45 seconds of the unauthorized conversation in order to determine whether the fraudulent call was completed, the place where it went and the identity of the caller.

STATUTE INVOLVED

47 U.S.C. 605 provides in pertinent part:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport,

> effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; * * *

STATEMENT

Petitioner was convicted under an indictment returned in the United States District Court for the Southern District of Florida of defrauding the telephone company, in violation of the wire fraud statute, 18 U.S.C. 1343 (count one). He and Nathan Modell were also convicted of wagering by wire in violation of 18 U.S.C. 1084 (count four) and using the telephone in interstate commerce to promote an unlawful activity in violation of 18 U.S.C. 1952 (count five). On December 2, 1966 petitioner was sentenced to six months' imprisonment followed by five years probation on each count, the sentences to run concurrently. He was also fined $10,000 (1 R. 312–313). The court of appeals affirmed.

The sole issue is the legality of the action of the telephone company in using a recording device to record automatically the first 35 to 45 seconds of petitioner's conversations whenever petitioner used an electronic device known as a "blue box" to circumvent the normal automatic toll recording equipment of the telephone company, thereby enabling him to make long-distance telephone calls without paying any of the required charges.

A regularly placed long distance call is fed into a computer (an automatic message accounting machine) which records the telephone number from which the call originates, the number called and the duration of the call, and computes the amount of money due on that particular call (1 R. 52). To avoid having his calls fed into this computer, the user of the "blue box" initially gains access to the telephone circuit by dialing directly the long distance information number in an out of town area—information is a free service which is not billed. He then activates the "blue box" which first emits a 2600 cycle tone that disconnects the number originally dialed and then emits tones that activate the telephone network to connect him to the number he desires. Thus, by use of the "blue box" the caller is able to bypass the accounting machine and gain free use of the telephone circuits (1 R. 35–36).[1]

On November 24, 1965, the New York Office of the Telephone Company notified its Miami subsidiary of the likelihood that a "blue box" was being used on Miami telephone number 945–9723 (1 R. 34, 40). The Miami Office checked its records and found that petitioner was the subscriber to this number. The Miami Security Officer knew that petitioner was reputed to be a bookmaker and that bookmakers commonly used such devices (1. R. 40–41). Thereafter the Telephone Company attached to petitioner's line, at its central office, electronic equipment capable of detecting the

[1] Another electronic device known as the black box may be used at the termination end of the call to make it falsely appear to the toll billing network that a telephone call was never answered (1 R. 37).

abnormal 2600 cycle tone on petitioner's telephone line.[2] Initially this equipment was connected only to a peg counter meter which registered the number of times that petitioner's telephone line emitted a 2600 cycle tone (1 R 42–43, 80–82).

On November 25, after the peg counter meter indicated that petitioner's telephone was emitting 2600 cycle tones (1 R. 43), the telephone company connected to petitioner's line a tape recorder that would be activated whenever petitioner's phone emitted the telltale 2600 cycle tone. The tape recorder operated for a period of 35 to 45 seconds whenever petitioner's telephone line sent forth a 2600 cycle tone, turning off automatically at the expiration of this period. When the tape recorder was activated by the 2600 cycle tone, it recorded the commencement of conversations in petitioner's line. The telephone company was not interested in the contents of the conversation as such but wished to record the dial tones originating at this telephone and to be able to show that a long-distance connection had been established (1 R. 43–44). The detection unit, peg counter and tape recorder remained on petitioner's line sporadically for twenty three days until December 21, 1965 (1 R. 46–48). During this time the tape recorder recorded portions of 100 long dis-

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[2] The Security Manager testified (1 R. 42):

"I must point out that in our toll network the 2600-cycle tone does not originate from a subscriber's phone. It originates from a toll office which is beyond the subscriber's phone. This tone is filtered out as to the subscribed (sic) at all times. When the portable unit is attached to the subscriber's phone, it senses the 2600-cycle tone from the subscriber's telephone."

tance telephone calls placed through the use of a "blue box" (1 R. 158–162). Thereafter, pursuant to subpoena, the telephone company turned over its tapes to a federal grand jury (1 R. 48–51). On January 7, 1966, primarily on the basis of the tapes, federal agents obtained a search warrant for petitioner's home and seized, among other things, a "blue box" (1 R. 90–91, 152, 163, 178–179).

In the district court, petitioner moved to suppress as evidence the tape recordings and the evidence seized under the search warrant on the ground that the recordings violated his rights under 47 U.S.C. 605 and the Fourth Amendment (1 R. 178–179). Following a hearing, the district judge denied this motion. On October 3, 1966, petitioner waived trial by jury and entered into a stipulation admitting the truthfulness of the allegations in counts 1, 4 and 5 of the indictment preserving, however, his right to appeal the ruling on the motion to suppress the evidence (1 R. 131–138).

ARGUMENT

1. Relying on *Katz* v. *United States,* 389 U.S. 347, petitioner contends that his right to privacy was violated when the Telephone Company [3] recorded the conversations in which he participated after fraudulently gaining access to the Telephone Company cir-

[3] We assume for the purpose of argument that the Fourth Amendment could reach purely private action, but see *Burdeau* v. *McDowell,* 256 U.S. 465, because the court below did not consider this issue.

cuits by use of the "blue box".[4] We submit that the underlying premise of petitioner's argument is fallacious.

A trespasser who enters a vacant apartment and sets up residence could hardly complain that his right to privacy was violated if the landlord entered the apartment and found him there. Similarly, while he was using the telephone lines as a trespasser, petitioner had no constitutional right to be protected from endeavors by the Telephone Company to overhear his conversation so that the Company could later prove his fraud and establish its right to payment. To hold otherwise would mean that a thief in a house could complain that his privacy was unconstitutionally invaded when the owner of the house returned and entered without knocking.

Under the Fourth Amendment, a person who legally places a long distance telephone call in a regular manner "is surely entitled to assume that the words he utters in the mouthpiece will not be broadcast to the world." *Katz* v. *United States,* 389 U.S. 347, 352. But, as the court said in *Brandon* v. *United States,* 382 F. 2d 607, 610–611 (C.A. 10):

> "* * * one who directly dials a distant number impliedly agrees that the telephone company may use the means necessary to ascertain where the call originated, the number

[4] It is important to note again that the recorder was activated only when petitioner's phone emitted a 2600 cycle tone and that such tones are not emitted by the subscriber's phone in the normal operation of the telephone system.

> called, and the duration of the conversation, in order that the proper charge may be recorded. * * *"

Petitioner, as a fraudulent user of the telephone service, is, of course, entitled to no greater protection that a normal user of service. He must be deemed to assume the risk that the telephone company would adopt measures to identify the calls, the place where the calls originated, the number called and the duration of the conversation. In addition, since he endeavored to evade the normal billing devices employed by the Telephone Company, it is not unreasonable to say that petitioner assumed the risk that the Company would use a recording device in order to identify the person who made the call and was thus liable to pay the toll.

2. The telephone company's recording of the first 35 to 45 seconds of petitioner's telephone calls whenever he employed a "blue box" to bypass the regular billing equipment did not violate Section 605 of the Communication Act of 1934. The Communications Act does not restrict the telephone company from taking this reasonable action to protect itself against trespassers on its lines.

Congress enacted the Communications Act as a comprehensive plan for the regulation of interstate communication. *Benanti* v. *United States,* 355 U.S. 96, 104. It obligated each carrier to maintain correct and complete accounts and records of the movement of traffic over its facilities and forbade each carrier from giving any preference to any person in its charges. 47 U.S.C. 220, 202, 203. In addition, Congress in the Internal Revenue Code, obligated the telephone com-

pany to collect the federal excise tax upon each long distance call. 26 U.S.C. 4251. The company thus has an affirmative obligation to the public and to the government to endeavor to make certain that fees for telephone calls are accurately billed.

Section 605 which prohibits any person not authorized by the sender to intercept and divulge any telephone communication must be read in light of its purpose which was to protect the integrity of the communications system. *Benanti* v. *United States*, 355 U.S. 96, 100. The obligations that Congress has placed on the telephone company in billing, charges, service and excise taxes all presuppose the regular use of the telephone. The prohibition against interception, therefore, protects only the user who has rightfully gained access to the telephone lines. It should not be interpreted to protect one, who, in direct contravention of the system for equal billing and equal taxation, fraudulently gains access to the long distance circuits and by-passes the billing mechanism of the telephone company. Cf. *United States* v. *Sugden*, 226 F. 2d 281 (C.A. 9), affirmed *per curiam*, 351 U.S. 916. What this Court said in *Rathbun* v. *United States*, 355 U.S. 107, 109, in interpreting this very statute, is likewise applicable here: "Every statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature. * * * That principle would be violated if we attributed to Congress acceptance of the results that would occur here from the position argued by petitioner."

As the court below pointed out, Section 605 recognized that there would be occasions when employees

of the telephone company would necessarily have to know the contents of conversations. The first clause of Section 605, thus, does not proscribe the interception of communications by a person "assisting in receiving * * * or assisting in transmitting" the communications. Developments in electronics have changed the conditions under which it becomes necessary for employees of the telephone company to obtain information. It is, however, evident that Section 605 was not intended to prevent overhearing of telephone company employees in the proper conduct of the company's business. Since here the limited overhearing which occurred was for the proper conduct of company business, there was no violation of Section 605.

When the fraud was discovered, the telephone company properly informed law enforcement authorities of that fact. The fact that after the subpoenas were complied with, the tapes revealed, not only the fraud, but also illegal gambling serves neither to render improper the initial action by the telephone company, nor to bar prosecution for the crimes thus legitimately brought to light.

Bubis v. *United States,* 384 F. 2d 643 (C.A. 9), upon which petitioner relies is not in conflict with the decision below. In that case, the court found a violation of Section 605 because the telephone company monitored and recorded *all* incoming and outgoing calls, fraudulent or otherwise for a period of three months. Here, on the other hand, the Company monitored only the calls which were made by the use of the illegal "blue box" and only for a limited period

of time to identify the voice of the wrongful user and, prior to producing the recordings pursuant to subpoena, the telephone company representatives had advised the government only that they had evidence of toll fraud. Since the activity of the telephone company here did not go beyond that which was necessary to preserve the integrity of the company's operations, there was here no invasion of any legitimate right of privacy.

At all events, however, the question of the applicability of Section 605 to the conduct of the telephone company's agent presented in this case is without any prospective importance. In enacting the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 197, 213–214) Congress in Section 802, added § 2511 (2)(a) to Title 18 providing:

> It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

Thus, there can be no question that the conduct of the telephone company officials here would be lawful under the new statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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